STATE OF MICHIGAN

COURT OF APPEALS

TERRY FICKE and SHERRY FICKE, Plaintiffs-Appellants, v LENAWEE COUNTY DRAIN COMMISSION, LENAWEE COUNTY DRAIN COMMISSIONER, and LENAWEE COUNTY BOARD OF COUNTY ROAD COMMISSIONERS, Defendants-Appellees.	UNPUBLISHED May 3, 2011 No. 296076 Lenawee Circuit Court LC No. 08-003061-NI

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs Terry and Sherry Ficke appeal as of right from the trial court's orders granting defendants' respective motions for summary disposition. We affirm.

I

On July 26, 2006, in the course of his employment, plaintiff Terry Ficke was riding on the spraying platform of a tractor spraying roadside weeds along Horton Road in Riga Township, "in the vicinity of the 'Goll Drain.'" The tractor was being driven by a co-worker. Plaintiffs allege that the tractor went over a roadbed depression at the Goll Drain and that, when it did so, Terry was thrown from the tractor and was seriously injured.[1] Plaintiffs filed the instant action, alleging that defendant Lenawee County Drain Commission and the Lenawee County Drain Commissioner (hereafter referred to collectively as the "Drain Commission") were negligent and grossly negligent in their maintenance of the Goll Drain culvert, and that defendant Board of County Road Commissioners for Lenawee County (the "Road Commission") was negligent and grossly negligent in its maintenance of the roadbed in the vicinity of the Goll Drain.

[1] Sherry Ficke is asserting a claim for loss of consortium.

It is undisputed that plaintiffs did not provide pre-suit notice to either the Road Commission or the Drain Commission of the incident causing Terry's injuries. Consequently, the trial court granted the Road Commission's motion for summary disposition pursuant to MCR 2.116(C)(7), on the basis that plaintiffs' claims are barred by their failure to comply with the mandatory notice provisions set forth in MCL 691.1404(1). Eventually, after the completion of discovery, the trial court granted the Drain Commission's motion for summary disposition, pursuant to MCR 2.116(C)(7), (8) and (10), concluding that no "sewage disposal system event" could have occurred at the Goll Drain, so as to except the action from governmental immunity, because that drain disposes of storm water and not sanitary sewage. This appeal followed.

II

Plaintiffs first argue that the trial court erred by concluding that their claim against the Road Commission was barred by their failure to provide pre-suit notice to the Road Commission within 120 days of Terry's injuries. Plaintiff asserts that MCL 691.1404 is not applicable to county road commissions pursuant to MCL 691.1402, and, further, that because the notice provision applicable to suits against county road commissions, set forth in MCL 224.21, has been declared unconstitutional, there is no pre-suit notice requirement applicable to suits against county road commissions. We disagree.

This Court reviews a motion for summary disposition under MCR 2.116(C)(7) de novo. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). The Court accepts as true the contents of the complaint unless contradicted by documentation submitted by the movant, and considers all admissible affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(5); *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). Determination of the applicability of governmental immunity generally, and of the highway exception specifically, is a question of law subject to de novo consideration on appeal. *Plunkett v Dep't of Trans*, 286 Mich App 168, 180; 779 NW2d 263 (2009); *Cain v Lansing Housing Comm*, 235 Mich App 566, 568; 599 NW2d 516 (1999). A plaintiff suing the state has the burden of proving an exception to governmental immunity, *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987), and may not oppose summary disposition on the basis of unsupported speculation or conjecture, *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

Generally, governmental agencies enjoy statutory immunity from tort liability when engaged in governmental functions, unless one of the narrowly drawn statutory exceptions to that immunity applies. MCL 691.1407; *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 134; 523 NW2d 791 (1994), amended 451 Mich 1236 (1996). The highway exception to governmental immunity is set forth in MCL 691.1402(1), which provides in part:

> [E]ach governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. *The liability, procedure, and remedy as to county roads*

> *under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21*. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel. [Emphasis added.]

MCL 691.1404(1) requires, "[a]s a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect." Specifically regarding actions brought against the boards of county road commissions, however, MCL 224.21 provides that "a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a defective county road, bridge or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners."

In *Brown v Manistee Road Comm*, 452 Mich 354, 356; 550 NW2d 215 (1996), our Supreme Court held that the 60-day notice provision set forth in MCL 224.21 was unconstitutional and thus, that "the 120-day notice provision applies in an action for personal injuries against a county road commission." The Court explained,

> We begin with the fundamental principle that governmental agencies are statutorily immune from tort liability. The Legislature has, however, provided exceptions to immunity, including liability for failure to properly maintain highways and failure to maintain county roads in reasonable repair. As a condition of this particular waiver of immunity, . . . the Legislature requires notice of the alleged injury and defect to be served on the appropriate governmental agency. However, the two potentially governing statutes in this case provide different notice periods. [MCL 224.21] addressing county road commission liability, compels the injured party to file a notice of the claim with the clerk and the chairman of the board of county road commissioners within *sixty days* of the injury. [MCL. 691.1404] addressing the identical liability for the state, its political subdivisions (including county road commissions), and municipal corporations, requires the injured party to file a notice of the claim with a governmental agency within *120 days* of the injury.
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> We have previously discerned the legislative intent "to provide uniform liability and immunity to both state and local government agencies." We, therefore, note that the distinct notice periods in the two statutes are suspect because it is clear that [MCL 691.1404] and [MCL 224.21] govern identical causes of action for defective road and highway maintenance. By providing different notice periods, the legislation divides injured persons into two classes: those injured on a defective road controlled by a county road commission and

> those injured on a defective road controlled by other governmental agencies. [*Id*. at 358-361 (citations omitted, emphasis in original).]

The Court concluded that the 60-day notice provision set forth in MCL 224.21 was unconstitutional, explaining:

> The only purpose that this Court has been able to posit for a notice requirement is to prevent prejudice to the governmental agency:
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> > [A]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision. . . .
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> Notice provisions, therefore, permit a governmental agency to gather evidence quickly in order to evaluate a claim. . . . . [the] defendant claims that another purpose for the notice provision is to enable the county to remedy any road defects and prevent future injury. A county cannot be prejudiced with respect to the injured party's claim, . . . to enforce the notice provision because of the possibility of a future injury. A future injury does not affect a governmental agency's ability to defend itself against the original claim.
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> The notice provision has the same purpose, therefore, irrespective of whether the action is brought against the state, a city, township, or county road commission. However, an injured person with a negligent highway cause of action against a "political subdivision" must comply with the 120-day notice provision in [MCL 691.1404], whereas a person with an identical cause of action against a county road commission must comply with the sixty-day notice provision in [MCL 224.21]. Thus, a person injured in a county in which there is no county road commission would be required to file notice of the claim within 120 days, whereas an identical person injured in a county that has a county road commission would be required to provide notice within sixty days to the county road commissioner.
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> Therefore, despite a presumption of constitutionality, we are unable to perceive a rational basis for the county road commission statute to mandate notice of a claim within sixty days. During oral argument, attorney for [the] defendant asserted that one could only "surmise" that the distinction is justified by the county road commission's responsibility for "many miles of rural road." However, we believe that there are no "facts either known or which could reasonably be assumed" that indicate a road commission requires a shorter notice period merely because it is responsible for rural roads. This fact bears no relationship to the stated purpose of the notice provision. There may be no dispute that the governmental agencies under [MCL 691.1401(e)] are likewise responsible for many miles of rural roads, highways, and streets. Accordingly, the distinct sixty-day notice provision required for claims against a county road commission is unconstitutional. [*Id*. at 362-364 (citations omitted).]

After determining that the 120-day notice provision set forth in MCL 691.1404(1) was not unreasonably short, the Court held that the 120-day notice provision applied to the plaintiff's claim against the defendant county road commission. *Id*. at 364. The Court thus concluded by "revers[ing] the holding of the Court of Appeals that the sixty-day provision applies, and hold[ing] that the 120-day provision applies to lawsuits against a county road commission." *Id.* at 368.

Additionally, the Court in *Brown* addressed the issue whether it should overrule precedent requiring that a governmental entity show prejudice from late notice before dismissal of a claim was warranted. The Court declined to do so, and determined that the defendant road commission had not established that it suffered prejudice as a result of the plaintiff's failure to provide it with notice within the 120-day period. Thus, the Court concluded that dismissal of the complaint was not warranted in that case. *Id.* at 365-368.

In *Rowland v Washtenaw Co Road Comm*, 477 Mich 197; 731 NW2d 41 (2007), our Supreme Court revisited the issue of whether a governmental agency is required to establish that it suffered prejudice resulting from the plaintiff's failure to provide notice to the governmental agency within 120 days of the injuries as required by MCL 691.1404. The plaintiff in *Rowland* filed suit against the defendant county road commission for injuries sustained in a fall as a result of a defective condition of a county road. However, she served the defendant with written notice of her claims 140 days after the injury occurred. *Id*. at 201. The Supreme Court overruled the prejudice requirement reaffirmed in *Brown*, and concluded that no showing of prejudice was necessary. The Court explained:

> The issue in this case is whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written. This statute provides in pertinent part:
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> > As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
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> We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury. This Court previously held in *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356–357; 550 NW2d 215 (1996), that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. *Those cases are overruled.*
>
> Accordingly, the order of the trial court denying summary disposition to defendant on the basis of *Hobbs/Brown* is reversed, the judgment of the Court of

> Appeals affirming the trial court's order is also reversed, and the case is remanded to the trial court for the entry of an order granting defendant summary disposition because plaintiff failed to provide notice within 120 days "[a]s a condition to any recovery" for injuries she claims she sustained by reason of a defective highway. [*Id.* at 200 (emphasis added).]

The Court observed that

> MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered.* Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice*. [*Id.* at 219 (emphasis in original).]

The *Rowland* Court did not explicitly consider or address its holding in *Brown* that the 60-day notice provision set forth in MCL 224.21 is unconstitutional, and thus, that the 120-day provision applies to actions against county road commissions. However, it applied the 120-day notice provision to the plaintiff's claim against the Washtenaw County Road Commission. And, following *Rowland*, our Supreme Court has likewise applied that 120-day notice provision when peremptorily reversing this Court's decisions on the basis of a plaintiff's failure to provide timely notice to defendant county road commissions under MCL 691.1404, in *Mauer v Topping*, 480 Mich 912; 739 NW2d 625 (2007) and *Leech v Kramer*, 479 Mich 858; 735 NW2d 272 (2007). We therefore conclude that both *Brown* and *Rowland* require that the 120-day notice provision set forth in MCL 691.1404(1) be applied to actions against county road commissions.

Plaintiffs argue that "[b]oth *Brown* and *Rowland* assumed that MCL 691.1404 would be applicable to Road Commissions, but neither case mentions MCL 691.1402(1)," and thus, that the issue of whether MCL 691.1402(1) excludes the application of the notice provisions of MCL 691.1404 to county road commissions "simply was not addressed in *Rowland* or *Brown*." Plaintiffs are correct that neither case discusses MCL 691.1402(1). However, both *Rowland* and *Brown* unequivocally hold that the 120-day notice provision set forth in MCL 691.1404(1) applies to actions against county road commissions. This Court is bound to follow the decisions of our Supreme Court, regardless whether they are well-reasoned or whether this Court believes the decisions to be correct, unless and until they are modified or overruled by the Supreme Court. *People v Metamora Water Service, Inc*, 276 Mich App 376, 388; 741 NW2d 61 (2007); *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996). As our Supreme Court explained in *Boyd v W.G. Wade Shows*, 443 Mich 515, 532; 505 NW2d 544 (1993), overruled on other grounds, *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007):

> As the Court of Appeals repeatedly noted, it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority. While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. [Citations omitted.]

Thus, the trial court and this Court are bound by *Rowland* and *Brown* to apply the 120-day notice provision set forth in MCL 691.1404(1) to bar plaintiffs' claims against the Road Commission in the instant case. Plaintiffs' argument that those cases were wrongly decided because they failed to consider the language in MCL 691.1402(1) that the "liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided" in MCL 224.21 is properly addressed to the Supreme Court.

III

Plaintiffs next argue that the trial court erred by granting the Drain Commission's motion for summary disposition on the basis that a "sewage disposal system event" can only result where the sewage disposal system involved carries human waste effluent. Defendant concedes that the trial court erred in this regard, but asks this Court to affirm the trial court's grant of summary disposition on the basis that plaintiff failed to establish a genuine issue of material fact as to whether a sewage disposal system event occurred causing Terry's injuries. We agree that the trial court plainly erred by concluding that there could not be a "sewage disposal system event" at the Horton Road culvert because the culvert did not carry human waste effluent. We further conclude, however, that summary disposition was proper because the evidence presented does not permit the conclusion that a "sewage disposal system event" occurred.

The question of whether an overflow, backup or flooding of a storm water drain constitutes a "sewage disposal system event" was raised before and decided by the trial court. Therefore, that issue is properly preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). The question of whether plaintiffs established a question of fact as to the occurrence of a "sewage disposal system event" was raised before, but not addressed or decided by the trial court. Therefore, it is not considered preserved. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005); *Fast Air*, 235 Mich App at 549. "However, where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines*, 265 Mich App at 443-444, citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

The sewage disposal system event exception to governmental immunity, MCL 691.1417, provides in part that "[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." A "sewage disposal system event" is the overflow or backup of a sewage disposal system onto real property, but not including an overflow or backup whose substantial proximate cause is an obstruction in a service lead not caused by a governmental agency, a connection to a sewage disposal system on the affected property, or an act of war or terrorism. MCL 691.1416(k); *Linton v Arenac County Rd Comm*, 273 Mich App 107, 115; 729 NW2d 883 (2006).

The trial court granted summary disposition to the Drain Commission on the basis that no "sewage disposal system event" could occur unless sewage (i.e., human waste effluent) was involved. Plainly, as the Drain Commission concedes, this was error. MCL 691.1416(j) defines "sewage disposal systems" as meaning "all interceptor sewers, *storm sewers*, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used in the collection, treatment and disposal of sewage and industrial wastes," and as specifically including "a storm water drain system under the jurisdiction and control of a governmental agency." *Linton*, 273 Mich App at 120-121; *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 282; 745 NW2d 513 (2007). Thus, the trial court's decision to grant the Drain Commission summary disposition on this basis was erroneous.

The Drain Commission argues that, despite the trial court's error, this Court should affirm the grant of summary disposition because plaintiffs presented no evidence that Terry's injuries were the result of a "sewage disposal system event" so as to exempt their claim from governmental immunity. Although presented before it, the trial court did not reach this issue. However, as noted above, "where the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded. *Hines*, 265 Mich App at 443-444, citing *Peterman*, 446 Mich at 183. Thus, this Court has the discretion to address defendant's assertion that affirmance is warranted on alternative grounds.

A person asserting a claim under the sewage disposal system event exception to governmental immunity must show, as to the time of the event: (1) that the plaintiff suffered property damage or physical injury caused by a sewage disposal system event; (2) that the governmental agency was an appropriate governmental agency; (3) that the sewage disposal system had a defect; (4) that the governmental agency knew or in the exercise of reasonable diligence should have known about the defect; (5) that the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct or remedy the defect; (6) that the defect was a substantial proximate cause of the event and the damage or injury; (7) through reasonable proof, ownership and the value of any damages to personal property; and (8) that the plaintiff provided notice as required by the act. MCL 691.1417(3); MCL 691.1417(4); *Linton*, 273 Mich App at 113-114. Thus, to prevail on their claim, then, plaintiffs must establish that the occurrence of a "sewage disposal system event" at the Horton Road culvert. MCL 691.1416(k) defines a "sewage disposal system event" as "the overflow or backup of a sewage disposal system onto real property."

The Drain Commission asserts here, as it did below, that plaintiffs proffered no evidence that Terry's injuries were the result of a "sewage disposal system event," that is of "an overflow

or backup," at the Horton Road culvert. The Drain Commission again argues that the deposition testimony of the witnesses provides no basis to conclude that there was such an event; it points to testimony from the Riga Township Supervisor and the Drain Commissioner that there had been no flooding in the Goll Drain District and that they were not aware of any flooding ever occurring in the Horton Road area. Based on this testimony, the Drain Commission asserts that, considering their respective professional positions, the fact that neither of these witnesses had any knowledge of flooding or overflows in the area constitutes circumstantial evidence that no flooding or overflows occurred. The Drain Commission further argues that a 2005 study obtained by the Drain Commission (the Spicer study) indicating that the culvert was in poor condition and recommending its replacement, does not permit such a conclusion. The Drain Commissioner explained that "poor condition" means that the culvert "probably had a life of five to ten years" and did not mean that it "was coming apart or failing at the time." Similarly, the Drain Commission asserts, that the Spicer Report recommended that various culverts be replaced because they were either undersized or at the wrong grade does not support plaintiffs' contention that a failure of the culvert caused the depression in the road leading to Terry's injuries, because, as the Township Supervisor explained, the culverts were too high and not too low. Finally, the Drain Commission reiterates that the documents cited by plaintiffs, including the minutes of the September 3, 2004 Riga Township meeting, which indicate that there were "drainage problems" in the area and mentioning that culverts need to be replaced under Horton Road do not establish the occurrence of a sewage disposal system event.

Plaintiff presented evidence that flooding can cause subsidence of the roadbed, and that there was a depression in the roadbed causing Terry's injuries. Plaintiffs also presented evidence that the culvert at issue was old and in "poor condition," that there were discussions about replacing it before July 26, 2006, that it had been replaced after Terry was injured, that the Drain Commission performed dredging work at the culvert in 1999 or 2000 to restore it to "original grade," and that the culvert was either undersized or at the wrong grade. Plaintiffs argued that the documentary evidence presented to the trial court demonstrated that there had been flooding problems in the Goll Drain district, including at sites on Horton Road. From this evidence, one can infer that the culvert may not have been operating properly. However, while plaintiffs have established that conditions were such that an overflow or backup *could* have occurred at the location, they have not offered sufficient evidence to permit a fact-finder to conclude that an overflow or backup *did* occur. There were no reports or complaints of flooding at that location, and the Drain Commission received no requests to replace the culvert at issue here. And, while the minutes of the September 3, 2004 Riga Township meeting, indicate "drainage problems," we cannot conclude that such a mention is sufficient to permit the conclusion that there was an overflow or backup at the culvert leading to the depression in the roadbed, which caused Terry's injuries. While circumstantial evidence may be sufficient to establish a case, a party opposing a motion for summary disposition must present more than speculation or conjecture to meet its burden of establishing a question of fact sufficient to defeat a motion for summary disposition. *Karbel*, 247 Mich App 97. "A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id*. quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993). Plaintiffs' evidence here constitutes such "[a] conjecture." Consequently, we affirm the grant of summary disposition to the Drain Commission on the basis that plaintiffs failed to present sufficient evidence to establish a question of fact as to whether a "sewage disposal system event" occurred leading to plaintiff's injuries. *Fisher v Blankenship*, 286 Mich App 54, 70; 777 NW2d

469 (2009) ("this Court will affirm where the trial court came to the right result even if for the wrong reason"); *Hines*, 265 Mich App at 443-444.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly